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86-866

No. A-84

Supreme Court, U.S.
FILED
OCT 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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ANTOINETTE MORIARTY
AND KATHLEEN MORIARTY,
Petitioners

-vs-

FAIRFIELD COMMONS CONDOMINIUM
ASSOCIATION & CARL ARMSTRONG, M.D.
Respondents

---

# PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS SIXTH APPELLATE DISTRICT LUCAS COUNTY, STATE OF OHIO

---

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13277

## QUESTIONS PRESENTED

I.

What standards should apply when the enforcement of one party's private property interests deprives another of his sole opportunity to exercise his First Amendment rights to free speech, press, religion and assembly?

II.

Is it a violation of the Sixth and Fourteenth Amendment guarantees of due process for defendants in a criminal, or quasi-criminal, action to be denied the names of witnesses prior to trial?

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*Other parties to this action are: John M. Stasa, Marjorie Reed, Joseph & Marjorie Ganzel, John E. Gaski, & Marygrove Catholics United for Life.

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THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
LUCAS COUNTY, STATE OF OHIO

---

## OPINIONS BELOW

The opinion of the Court of Appeals is unreported (Appendix p.A5). The denial of the Supreme Court of the State of Ohio (Appendix p.A3) is not reported.

## JURISDICTION

The opinion of the Court of Appeals, Sixth Appellate District, Lucas County, Ohio (Appendix p.A5), issued November 29, 1985, enforced the judgment of the Lucas County Court of Common Pleas, issued December 11, 1984. The Supreme Court for the State of Ohio denied jurisdiction on April 2, 1986, and denied a Motion for Reconsideration on May 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AMENDMENTS INVOLVED

The relevant provisions of the First, Sixth and Fourteenth Amendments are set forth below:

### FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohib-

iting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the juris-

diction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The original action was brought by the Fairfield Commons Condominium Association and Carl Armstrong, M.D., seeking to enjoin Defendants and others from entering upon the condominium property to exercise their First Amendment rights, on the parking lots and sidewalks of Fairfield Commons Condominium. The court issued a temprorary restraining order, confining Petitioners' picketing and other activities to the

public sidewalk, a great distance from the clinic, on August 11, 1983. On October 5, 1983 a preliminary injunction was issued.

In pre-trial motions and briefs Petitioners raised the federal questions presented herein; during the trial, timely objections were made as to all federal issues raised herein; in post-trial briefs, the same issues were argued to the trial court; in the Court of Appeals, Sixth Appellate District, as well as the Ohio Supreme Court, all the issues presented herein were argued.

On December 11, 1984, following a trial to the court, a permanent injunction was granted, limiting picketing to the public sidewalk, finding the Defendants in contempt, fining them each Ten Dollars ($10.00) with a one day jail term for each, which was suspended. Further, the Plaintiffs were awarded a judgment in the amount of $2500.00 with the Defendants paying costs. The matter was appealed to

the Lucas County Court of Appeals which modified the trial court's orders as to certain Defendants only, and upheld all other elements of the Common Pleas Court's order.

The Ohio Supreme Court refused to grant certiorari on April 2, 1986, and further refused to rehear the case on May 21, 1986. An application for an extension of time in which to file a petition for a writ of certiorari was filed in the United States Supreme Court and granted on August 8, 1986.

The Court of Appeals determined that "The entire condominium complex is located in one of the, if not the, largest commercial areas in the city of Toledo, Lucas County, Ohio."(Appendix p.A29)

The condominium complex consists of three buildings, the first building 200 feet from the center of the public street, the second is 350 feet from the center of the street, and the third building is 100

the street, and the third building is 100 feet behind the second. A narrow driveway provides the sole means of ingress and egress for the pie-shaped lot. The driveway runs along the east side of the complex, leading to an internal parking lot adjacent to the buildings and the sidewalks connecting the buildings. The Petitioners seek to distribute literature and other information to prospective patients on the internal sidewalks and the parking lot areas of the condominium. The question of abortion is one of the most devisive issues of our time, and violative of Petitioners religious convictions. Testimony was aduced at trial from Dr. Armstrong after examination of the materials being disseminated by Defendants that his staff would not be allowed to distribute such information to patients.

The public sidewalk lies within four feet of the street. If an automobile turns into the driveway, contact with any

passenger is impossible because the permanent injunction permits Petitioners to carry on their First Amendment activities only on the public sidewalk. Consequently, the demonstrators' primary target audience, the patients of Toledo Medical Services, who park their cars approximately 280 to 330 feet from the public sidewalk, are never accessible to the demonstrators' communications. The Petitioners merely seek to exercise their rights of freedom of speech, religion, press and assembly, and are being restrained from doing so.

The mechanistic approach, applied by the Ohio Court of Appeals in this case, involved a comparison of the public attributes of the Fairfield Commons property to the shopping mall property in Lloyd Corp. v. Tanner, 407 U.S. 551, (1972). The Petitioners do not wish to rely soley on the Lloyd comparison, but find it necessary to bring to the Court's attention a factual

oversight, relied on by the appellate court, directly relating to the criteria established in Lloyd. The trial record from the Lucas County Court of Common Pleas establishes that the condominium unit owners, primarily professionals such as Dr. Richard Ziegler and Dr. Carl Armstrong, held their businesses open to the public. That is to say that, although the professionals treated their patients, and invited them onto the premises by appointment, uncontroverted testimony expressly indicates that any new patient could walk into the office, without an appointment, and not be turned away, or be discouraged in any way. The Court of Appeals found, however, that "The condominium complex buildings house only professional offices such as psychiatrists, attorneys, dentists and physicians. The professionals within the complex treat their clients and invite them onto the premises by appointment only." (Appendix p.A29) This is directly

contrary to testimony by Plaintiff Armstrong and Plaintiff's witness Dr. Ziegler.

Petitioners' rights under the Sixth and Fourteenth Amendments to the United States Constitution have been abriged, and Petitioners have stood trial on a criminal, or at least quasi-criminal, matter, because the court prohibited proper discovery.

Defendants requested, in interrogatories, the names of all employees and/or patients, who may have been present on the days Petitioners were alleged to have been in the parking lot, or other areas in contempt of the temporary restraining order, and who might have been able to provide independent, third-party testimony. Plaintiffs did not file answers to the interrogatories, nor did they file a motion for a protective order, until the time for filing had long passed, and Petitioners were seeking sanctions from the trial court. The motion for protective

order in the instant case was not filed until more than thirty days after the date set for production. The court granted the protective order, and the names of potential witnesses were not supplied to Petitioners, who were subsequently held to be in contempt of court.

## REASONS FOR GRANTING THE WRIT

Review, by this Court, of the decisions below is warranted. First, Plaintiffs have used state action to deny Petitioners their First Amendment rights by denying Petitioners access to their intended audience. Through the use of trespass laws, and enforcement of judicial orders, Plaintiffs have prevented Petitioners from communicating their message to the intended audience. There is no other way for Petitioners to reach these people, except to have the opportunity to disseminate information to them in the

parking lot outside Toledo Medical Services. Second, Plaintiffs used state action to deny Petitioners their constitutionally guaranteed right to due process of law. Several of Petitioners were found to be in contempt, and sentenced accordingly, without benefit of the discovery process.

I. This Court's opinions in Lloyd Corp. v. Tanner, 407 U.S. 551, (1972), and Hudgens v. N.L.R.B., 424 U.S. 507, (1976), have provided precedents which conflict with the favored protections of the First and Fourteenth Amendments to the United States Constitution. In Lloyd this Court held that, in order for private property to be considered public for purposes of First Amendment rights to free speech, the private property must be imbued with public attributes, that the content of the picketing be related to the purpose to which the property is put, and that the forum being picketed be the only oppor-

tunity available through which the intended audience can be reached. Lloyd p. 563.

The Lloyd opinion held that "... the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private proprety used nondiscriminatorily for private purposes only ..." Hudgens v. N.L.R.B., 424 U.S. 507, 518 (1976); citing Lloyd v. Tanner, 407 U.S. 551, (1972). The key phrase here is "used nondiscriminatorily". Fairfield Commons is used in a discriminatory manner in that the property is open to the public for all who would enter, with or without an appointment, except when Petitioners wish to enter the property for purposes of exercising their First Amendment rights. The clinic does not provide literature about alternatives to abortion, which Petitioners seek to provide. So in that sense, the Respondents discriminatorily use the property. Then the owner of Toledo

Medical Services, the situs of Petitioners' picketing, wishes to perform a magic trick. Magic is the art of illusion - the art of making one thing appear to be something else. In this case the illusion Plaintiffs are trying to create is one of making the Fairfield Commons Condominium complex appear to be private property, when in fact, to anyone other than the Petitioners, Fairfield Commons is very much open to the public. Dr. Armstrong, the owner of Toledo Medical Services, and Dr. Richard Ziegler, testified at trial that he does indeed accept and treat walk-in patients, also known as members of the public who do not have an appointment to be seen in his office.

The managers of the company town in Marsh v. Alabama, 326 U.S. 501 (1946) used judicial enforcement of the company's property rights and the state's trespass laws to close the traditional forums of public communication to Grace Marsh. The

judicial enforcement of property rights and trespass laws becomes an exercise of governmental power in Marsh because the company owned all of the traditional forums essential for Marsh to disseminate her literature. In the case at bar, Fairfield Commons and Dr. Carl Armstrong used judicial orders and the state's trespass laws to close the only forum of public communication to Petitioners' intended audience. The requisite state action flows from "the private entity[s] ... displacement of ] the 'state' from control of all the places to which the public had historically enjoyed access for First Amendment purposes ..." Hudgens, 424 U.S. 507, 540 (1976)(Marshall dissenting).

In Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), the Court again recognized this formula for state action: private property rights coupled with state trespass laws and the monopoly the private

entity has concocted over the traditional channels of communication by judicial enforcement. The Court held that a privately owned shopping mall was the "functional equivalent" of the Marsh company town. The shopping mall owner did not have a monopoly of all the communication channels in the area, however, there was a monopoly of the channels that reached the businesses within the mall. In the instant case, Fairfield Commons and Dr. Armstrong have a monopoly of Petitioners' entire intended audience. The organizational picketing of the labor union was directly related to Weis Market Co. within the mall, therefore picketing at that location was essential to reach the intended audience. In the case at bar, the picketing is directly related to the business going on at Toledo Medical Services, the performance of abortions. Picketing at the Fairfield Commons location, particularly on the internal parking lots, is essential to

reach the intended audience.

Although Justice Douglas joined Justice Black's majority opinion in Marsh, he submitted a concurring opinion in the Logan Valley case. Justice Douglas recognized that the shopping mall was not dedicated to public use to the same degree of the "company town" in Marsh, yet he found sufficient state action in that the private property was open to public uses and presumably that the shopping center owner had monopolized all of the traditional channels for picketing directly related to the shopping center business. Inferentially, Justice Douglas joined the Marsh opinion not because the company town had all the attributes of a municipality but on the basis that the private entity exercised governmental power by combining its' property rights with state trespass laws and obtaining judicial enforcement.

The Fairfield Commons Condominium Association, et al., exhibit the same state

action and exercise the same government power found in Marsh and Logan Valley and searched for in Lloyd. The complex has sidewalks leading from building to building and open parking areas akin to the traditional forums of free speech. The complex is open to the general public, except to the Petitioners, as pointed out in the testimony of Dr. Zeigler and Dr. Armstrong. The representatives of the condominium complex have monopolized all of the traditional avenues for the anti-abortion demonstrators to express themselves to their intended audience. Thus, the private owners of the condominium complex displace the state from control of the traditional avenues for communication by enforcing state trepass and property rights laws and thereby privately assume government power constituting state action which must be subject to the protections of the First Amendment.

The case at bar exemplifies the

exact evil that Justice Marshall and Justice Douglas warned of in Logan Valley. Justice Marshall foresaw attempts by enterprises to situate themselves so as to create a cordon sanitaire of private property around its situs. In his concurrance in Logan Valley, Justice Douglas inquired, "Why should [Weis Market Co.] be permitted to avoid this evidence of carrying on a public business in the name of 'private property'? It is clear to me that they may not, when the public activity sought to be prohibited involves constitutionally protected expression respecting their business." Nevertheless Toledo Medical Services is permitted to avoid the incidence of carrying on a public abortion clinic with the support of the Fairfield Commons Condominium Association, et al., and the courts of Ohio. This sends a clear message to abortion clinics in Ohio and other states with similar precedent based on Lloyd and Hudgens. Such a result in the

name of private property goes directly to the heart of the supposed preferred protections of free expression and dissemi-namtion of ideas enunciated in the First Amendment.

Justice Powell's majority opinion in Hudgens labels the second criteria of the Lloyd analysis as contrary to First Amendment principles. The majority finds it unconstitutional to permit demonstrators on private property when the subject of their demonstration directly relates to a purpose which the property is put while denying other demonstrators access to the same forum because their subject matter lacks the direct relationship, citing Erznoznik v. City of Jacksonville 422 U.S. 205 (1975) and Police Department of Chicago v. Mosley, 408 U.S. 92 (19 72). The case at bar, Lloyd, and Logan Valley are distinguishable from the line of cases relied on by Hudgens in two respects.

The basis for discrimination in the

instant case, Lloyd, and Logan Valley does not stem from the content of the activist's message, but instead from the lack of available opportunities to reach the intended audience. The First Amendment guarantees, generally, the right to effective expression, Buckley v. Valeo, 424 U.S. 1, (1976), essential to effective expression is the opportunity to reach the relevant audience. In Logan Valley the relevant audience consisted of the patrons of Weis' Market, in Lloyd it was the citizenry of Atlanta; and in the instant case the anti-abortion demontrator's audience are primarily the women who go to Toledo Medical Services for abortions. Logan Valley Plaza and Fairfield Commons have a monopoly over all the traditional channels of communication with the patrons of Weis Market and patients of the abortion clinic, respectively. Lloyd Center did not have a monopoly over the alternatives that the anti-war protesters could

have used to reach the citizenry of Atlanta. The Court's refusal, in Lloyd, to permit anti-war handbilling did not prejudice the demonstrators because of the content of their message, but because there were alternative forums for their demonstrations. The message content is determinative only to the extent that it relates to the purpose the property is put; the availability of alternatives for effective expression poses the discriminatory factor. The anti-abortion demonstrators have no forums in which they can communicate their message, outside of gaining access to the internal parking lot and sidewalks of Fairfield Commons.

The Hudgens majority's concern with the limited reference to the expression's content in the Lloyd test finds no support in the rationale of Supreme Court cases addressing content-regulation. In Lloyd and Logan Valley the reliance on the message content does not "violate the

government's paramount obligation of neutrality ..." Young v. American Mini Theatres, Inc., 427 U.S. 50, 70; See also Greer v. Spock, 424 U.S. 828 (1976). The access that the private entity, exercising government power, yields to demonstrators does not depend on the entity's approval or disapproval of the position advocated by the demonstrator. The access to the private property depends on the monopoly states that the private entity has over traditional channels of communication and, in turn, the degree of relationship between the message content and the purpose the property is put.

Alternatively, Justice Marshall points out, in his dissent in Hudgens, that the question is not whether the private entity can censor expression based on its content, but "... is whether, and under what circumstances, the First Amend- ment has any application at all." Hudgens, 424 U.S. at 541. This Court's decision in

Police Department of Chicago v. Mosley, 408 U.S. 92, (1972), stands for the principle that "... [a]ny restriction or expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate or public issues should be uninhabited, robust and wideopen.'" Mosley 408 U.S. at 96; citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). If the anti-war protesters in Lloyd claimed their expression was restricted on the basis of content, this claim fails, due to the lack of state action on the part of Lloyd Center, in the form of monopolization of traditional channels of communication. Therefore, allowing demonstrators, who have no alternative opportunities to effectively express their message in no sense restricts those who have ample alternatives to effectively disseminate their ideas due to its content. This notion cannot run contrary to the position of Mosely calling

for uninhibited, robust and wide-open debate on public issues.

The case at bar can be distinguished from Hudgens, which dealt with an N.L.R.B. matter, and remanded it to the Board to be decided within the parameters of the N.L.R.A.. Further, the picketers in Hudgens had other forums in which to express their views, as there were eight stores in the City of Atlanta, and the warehouse which was the actual locale of the strike. In the instant case, Petitioners have no other forum. To reach their intended audience, they must be at the abortion clinic, in a position in which they can communicate their message to prospective patients.

There are no reasonable alternative opportunities available upon public property for conveying the Petitioners' message to the patients of the clinic for geographical reasons and due to the nature of the anti-abortion demonstration.

Hudgens and subsequent state and federal court decisions interpret Lloyd as requiring a showing that the private enterprise had assumed all of the attributes of a municipality exercising all the powers that states delegate to municipalities similar to the "company town" in Marsh v. Alabama 326 U.S. 501 (1946). Such interpretation misconstrues the basis on which state action was found in Marsh and Logan Valley.

Hudgens also incorrectly renders the second criteria of the Lloyd analysis inconsequential. The majority opinion reasoned that to allow only messages which directly relate to the purpose which the property is put is to discriminate against expression on the basis of its' content. This reasoning fails because the discrimination is based on the lack of availability of alternatives to reach the intended audience. Moreover, assuming, arguendo, that this is content-based dis-

crimination, it does not present any of the dangers that the First Amendment protects against by denying government the power to restrict expression because of its content.

The requirement that private property have all the attributes of a municipality to establish state action and vulnerability to First Amendment limitations reads more into the Marsh decision than intended. In Marsh the Court was not concerned with the government functions the corporation was providing (for example, the streets, the sewage system) because these functions had no effect on Grace Marsh's right to distribute religious literature. The constitutional scrutiny of the company town's infringement on First Amendment rights resulted from the governmental power the private entity exercised.

The nature of the Petitioners' anti-abortion message makes it crucial for

the individuals to directly address the patients of the abortion clinic. The Petitioners do not have the same advantage in picketing that a labor union has. When a labor union pickets an establishment, the effect is two-fold: First, the labor union informs the public of their grievances with the enterprise and; second, the union puts economic pressure on the establishment due to the reluctance of customers and associates to cross the picket line.

Most importantly, the Court needs to re-examine this line of cases, dealing with the balancing of First Amendment rights with private property rights. It is necessary to establish a clear standard, which Hudgens does not do, and which is apparently the Court's last word in this area. It is also ambiguous in setting standards to prioritize private property rights versus First Amendment rights. This Court must balance against

the Petitioners' First amendment rights any property rights the Plaintiffs might claim in the present case. The right to exclude others from one's property is not such an essential attribute of property ownership that a state's limitation of that right results in a constitutional "taking" of property. PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980).

II. The Defendants were entitled to dismissal of Plaintiffs' action, at the trial level. An integral part of this action was Plaintiffs' Motion for Issuance of Show Cause Order in Contempt, filed on January 24, 1984, moving the Court for an Order to adjudge the Defendants in contempt of court, making this proceeding a quasi-criminal action. Several Defendants were actually found to be in contempt, and sentenced accordingly. The Sixth Amendment to the United States Constitution guarantees, among other things,

that "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor ... ." The trial court found all of these Defendants to be in contempt and sentenced them to jail, while at the same time denying them access to the names and addresses of any and all parties who may have been witnesses to the events of the dates alleged. This was a quasi-criminal action, in which the Defendants should be afforded due process of the highest order. Instead, the trial court made it impossible for Defendants to provide witnesses on their own behalf, other than themselves. Many of the Defendants took the stand and testified that they had not been on the property since the issuance of the temporary injunction, but were unable to produce any independant witnesses to corroborate their testimony, because they were denied access to potential witnesses by the trial court.

The importance of having access to other potential witnesses is demonstrated beyond a shadow of a doubt by the fact that the trial court made a decision, finding three Defendants in contempt of court, based solely on the testimony of one witness who, because of the nature of her association with Dr. Armstrong, could be viewed as biased.

The trial court, in issuing its' decision granting the protective order, did not render an opinion stating its' reasons for said decision. In spite of the absence of such reasons, the Appellate Court found that the trial court "... could very well have found that this information fell within the physician-patient privilege and was therefore confidential and not discoverable." If this is what the trial court would have found, it is reversible error. The physician-patient relationship has nothing to do with the patients' presence at the

doctor's office, or with what they may have seen on their way in or out of the office. The physician-patient privilege applies to communications between the physician and the patient, which is not the type of information that was sought by Petitioners in the interrogatories. Petitioners merely needed to know who was in the building, or on the lot, on the days in question. Further, the physician-patient privilege cannot be interpreted to protect the names of employees who were present on the property on the days in question.

The Appellate Court goes on and formulates other hypotheses relative to reasons for which the trial court could have granted the protective order. The fact of the matter is that the trial court did not make any findings at all, as to the hypotheticals that the Appellate Court put forth. One of the hypotheses which the Appellate Court proposed was that "The

trial court could have found also that in light of appellants' previously demonstrated zealous convictions over the issues involved, that if appellants would have received the names and addresses of the patients and employees they may have misused this information to the detriment of those patients and employees.[emphasis added](App.Ct.Op. 612-613)" The very idea that an officer of the court would abuse his possession of this critical information, or supply it to Defendants for purposes of misusing it, as the Appellate Court suggests, is absurd, ludicrous and without substantiation or foundation.

While Plaintiff delayed the proceedings, through his willful refusal to respond to the interrogatories, Defendants' First Amendment Rights continued to be infringed upon by the temporary restraining order. Further, Plaintiff has far greater resources than the Defendants and was, by his conduct, denying Defen-

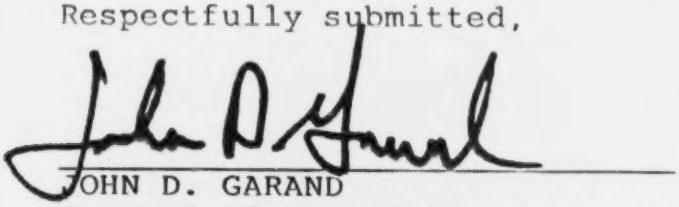
dants their right to a speedy conclusion of this matter which constitutes an interference with the administration of justice.

Plaintiffs filed this action for the purposes of denying the free expression of Defendants' First Amendment Rights. Looking at the totality of the circumstances, this is a classic case in which an example should be made, putting on notice all who would perpetrate purposeful delays on the Court, thereby depriving Defendants of their right to a speedy conclusion of these matters.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that this petition for writ of certiorari be granted.

Respectfully submitted,



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SUPREME COURT OF THE UNITED STATES

NO. A-84

FAIRFIELD COMMONS CONDOMINIUM ASSOCIATES, ET AL.

Applicants,

v.

JOHN STASA, ET AL.

---

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including October 18, 1986.

/s/ Warren E. Burger
Chief Justice of the
United States

Dated this 8th day of August, 1986.

THE SUPREME COURT OF OHIO
COLUMBUS

| | |
|---|---|
| Fairfield Commons Condominium Association, et al. Appellees, | 1986 TERM<br>To wit: May 21,1986 |
| vs. | Case No. 86-126 |
| John M. Stasa, et al. Appellants. | REHEARING ENTRY<br>(Lucas County) |

It is ordered by the Court that rehearing in this case be, and the same is hereby, denied.

/s/Frank D. Celebrezze
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 21st day of May 1986.

JAMES WM. KELLY CLERK

/s/ DANIEL J. CROWLEY DEPUTY

THE SUPREME COURT OF OHIO
COLUMBUS

Fairfield Commons Condominium Association, et al.
Appellees,

vs.

John M. Stasa, et al.
Appellants.

1986 TERM
To wit: Apr.21,1986

Case No. 86-126

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Lucas County to certify its record and the claimed appeal as of right from same said Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by
John D. Garand

/s/Frank D. Celebrezze
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this date_____.

JAMES WM. KELLY CLERK

/s/DANIEL J. CROWLEY DEPUTY

IN THE COURT OF APPEALS
OF LUCAS COUNTY

Fairfield Commons Condominium & Carl Armstrong, M.D.

Plaintiffs-Appellees

v.

John M. Stasa, Antoinette & Kathleen Moriarity, Marjorie Reed, Joseph & Marjorie Ganzel, John E. Ganzel, John E. Gaski, Marygrove Catholics United for Life

C.A. No. L-85-013

C.P. No. CV 83-1905

O P I N I O N

Decided:Nov.29, 1985

* * * *

Mr. John D. Garand and Ms. Mary M. Bollinger, Counsel for Appellants.

Messrs. Thomas J. Sheperek and Michael B. Adams, Counsel for Appellees.

* * * *

WILEY, J. This cause is before the court on appeal from a judgement of the Lucas County Court of Common Please, wherein that court issued a permanent injunction enjoining appellants from picketing on the private property of appellees and also found appellants in contempt of court for

violating prior restraining orders.

On December 11, 1984, the trial court rendered the following judgment:

> "NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the preliminary injunction be and it is hereby adopted and ordered permanent and in full force and effect.
>
> "And it is further ordered that defendants are permanently enjoined from any activities in the vicinity of (the) private residence of plaintiff, Dr. Carl Armstrong, and ordered to confine their activities to the public sidewalk along the property wherein the plaintiffs' clinic is situated, and
>
> "Each defendant is hereby fined Ten and 00/100 Dollars ($10.00) each, and the court sentences each defendant to one day in the county jail. However, the court suspends the jail sentence subject to strict compliance with the permanent injunction.
>
> "Plaintiff is awarded judgment in the amount of Twenty-five Hundred and 00/100 Dollars ($2,500.00) against all defendants for attorney fees. Each defendant is assessed an equal amount of the judgment."

From that final judgment appellants filed a timely notice of appeal. Appellants assert the following six assignments

of error:

"I. THAT TRIAL COURT ERRED IN NOT ORDERING ADEQUATE DISCOVERY IN A TIMELY MANNER THEREBY PREVENTING DEFENDANTS FROM LOCATING SOME POTENTIAL WITNESSES AND THOROUGHLY PREPARING THEIR DEFENSES.

"A. The trial court erred by not imposing sanctions, as provided in Ohio Rules of Civil Procedure 37(D) and 41(B), upon Plaintiff who did not answer the interrogatories and did not timely file for a protective order.

"B. The trial court erred by issuing a protective order prohibiting the disclosure of the names of the patients and by not ordering the Plaintiff to produce the names of the employees present the date Marjorie Reed was on the property.

"II. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE AND TESTIMONY WHICH SHOULD HAVE BEEN EXCLUDED.

"A. The trial court erred by ruling that Plaintiff Dr. Carl Armstrong owned four units of Fairfield Commons, without insisting upon adherence to the 'Best Evidence Rule' relative to the production of a deed, or deeds to the property.

"B.The trial court erred by ruling that Plaintiff Dr. Carl Armstrong represented Plaintiff Fairfield Commons Condominium Association.

"C.The trial court erred by admitting testimony relative to dates of alleged trespasses of Marjorie Reed which were not included in Plaintiff's answer to Defendant's interrogatories, and its' different rulings on the same objection.

"D. The trial court erred by admitting exhibits without a proper foundation.

III. THE TRIAL COURT'S RULINGS RESULT IN THE RESTRAINT OF DEFENDANTS' FIRST AMENDMENT RIGHTS.

A. The trial court erred by ruling Fairfield Commons is a condominium office complex, and as such private property from which Plaintiff's have a legal right to exclude Defendants, and that "the public sidewalk along Monroe Street is an adequate forum for defendant's to attempt to deliver their message and pursuade the public" and thus excerise their constitutional rights.

B. The trial court erred in not finding that the Fairfield Commons Condominium is a part of a totally commercial area and therefore has acquired a public, or at least a quasi-public nature.

C. The trial court erred by ruling that a permanent injunction should issue prohibiting picketing and protesting at Plaintiff, Dr. Carl Armstrong's residence.

IV. THE TRIAL COURT ERRED IN MAKING

CERTAIN CRITICAL FINDINGS OF FACT THAT ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

V. THE TRIAL COURT ERRED BY BIFURCATING THE TRIAL AND SEPARATION OF THE COUNTERCLAIM OF DEFENDANT MARJORIE REED.

VI. PUBLIC POLICY DICTATES THAT NECESSITY, IN SOME CIRCUMSTANCES, CAN EXCUSE TRESPASS OR OTHERWISE ACTIONABLE CONDUCT.

A. The trial court erred in not finding that these Defendants have a right to protect the rights and life of that unborn human being, as the Defendants feel that their actions are necessary in that defense. Defendants' constitutional rights to Freedom of Speech are greater in weight, when exercised for the purposes of protecting the rights, and even the life, of unborn human beings, than in other endeavors.

B. The trial court erred in not finding that, while, according to the U.S. Supreme Court, the unborn fetuses are not persons, they are human beings. Dr. Hillabrand offered uncontroverted testimony to that effect, which was given no consideration by the trial court. Medical science has pushed back the time that must elapse before the unborn fetus is considered to be viable.

C. Public Policy demands that the law be interpreted in such a manner that when invoked in the defense of

another human being, Defendants' First Amendment Rights are fundamental rights, not to be infringed upon except for the a compelling reason.

The appellants are individuals who do not believe in abortion and are demonstrating this belief by picketing the appellees' property where abortions take place. The named appellants are as follows: John M. Stasa, Marygrove Catholics United For Life, John E. Gaski, Marjorie Ganzel, Joheph Ganzel, Antoinette Moriarity, Kathleen Moriarity, and Marjorie Reed. The appellees are the The Fairfield Commons Condominium Association and Dr. Carl Armstrong. Dr. Armstrong owns condominium property which he rents to the Toledo Medical Services, Inc., of which he is the sole shareholder. Toledo Medical Services conducts abortions within the condominium property and that is the reason for appellants picketing on that property.

Appellees instituted this action by

filing a complaint for an injunction and a motion for a temporary restraining order against appellees Stasa, Marygrove Catholics United For Life, Gaski, M. Ganzel, and J. Ganzel on August 11, 1983, to enjoin those individuals from picketing on the Fairfield Condominium property. The trial court granted the temporary restraining order on August 12, 1983, after ahearing on the motion. Appellees then amended their complaint on August 29, 1983, to include A. Moriarity, K. Moriarity, and Reed as defendants. The trial court granted the motion for a temporary restraining order as to these latter three appellees on the same day. After extensions of the respective temporary restraining orders, preliminary injunctions were issued against appellees Stasa, Marygrove Catholics United For Life, Gaski, M. Ganzel and J. Ganzel on October 5, 1983 and against A. Moriarity, K. Moriarity, and Reed on December 7, 1983. On January 24, 1984, appellees filed a motion

to show cause why appellants should not be held in contempt for allegedly violating the preliminary injunctions. After the trial court bifurcated the proceedings so that the issues of the preliminary injunction and the appellants' alleged contempt could be held separate from the issues involved in a counterclaim filed by appellant Reeed, a trial was had on the issues of the permanent injunction and the appellants' alleged contempt before the court on September 5, 1984. The result of that trial was a judgment issued on December 11, 1984, issuing a permanent injunction against all the appellants enjoining them from picketing on appellees' property and also finding all appellants in contempt of court for violating the previous preliminary injunctions. It is from that judgment that the appellants appeal.

Addressing appellants' first assignment of error, they claim that the trial

court should have dismissed appellees' claim because they did not answer appellants' interrogatories in a timely fashion and, also, that the trial court should not have issued a protective order relieving appellees from answering certain interrogatories. Appellants Stasa, Gaski, M. Ganzel, J. Ganzel and Marygrove Catholics United For Life submitted interrogatories to appellees on January 24, 1984, to be answered within twenty-eight days pursuant to Civ. R. 33. On February 29, 1984, appellant Reed submitted similar interrogatories to appellees to be completed within twenty-eight days pursuant to Civ. R. 33. Appellees did not answer the interrogatories within the prescribed time but instead filed motions for protective orders as to appellant Reed's interrogatories on May 2, 1984, and as to the other appellants' interrogatories on May 11, 1984. The motions for protective orders sought to relieve appellees from answering

certain interrogatories. The appellees objected to, among other things, providing appellants with the names of patients who were at Toledo Medical Services on certain dates and also the names of employees of Toledo Medical Services. The trial court granted appellees' motion for a protective order and thereby relieved appellees from answering the interrogatories requesting the names and addresses of the patients of Toledo Medical Services and also the names and addresses of the employees of Toledo Medical Services.

Appellants argue that the trial court should have dismissed appellees' suit for not timely answering the interrogatories pursuant to Civ. R. 41(B) and/or 37(D). First, Civ. R. 41(B) allows a dismissal for failure to prosecute, however, failure to answer interrogatories is not a ground for dismissal under Civ. R. 41(B)(1). See Schreiner v. Karson (1977), 52 Ohio App. 2d 219; Societe Internationale

Pour Participations Industrielles v. Rogers (1958), 357 U.S. 197. The proper rule to be used where there is a failure to comply with discovery is Civ. R. 37. Under Civ. R. 37(D) a party is subject to the sanctions listed in subsections (A), (B), and (C) of subdivision (B)(2) of Civ. R. 37, for failing to answer interrogatories. Subsection (C) of subdivision (B)(2) of Civ. R. 37, allows for the dismissal of the action against the disobedient party. Appellants claim it was error for the trial court not to dismiss the action due to appellees' failure to answer the interrogatories within the prescribed time. The sanction of dismissal should only be used in extreme situations and should only be used "where circumstances demonstrate evasion and total avoidance of responsibility by a party to respond to discovery requests." Smith v. Smith (1982), 5 Ohio App. 3d 185, 198. The trial court has broad discretion in discovery matters. See

State, ex rel. Daggett, v. Gessaman (1973), 34 Ohio St. 2d 55; Penn Central Transportation Co. v. Armco Steel Corp. (1971), 27 Ohio Misc. 76. We cannot say that the trial court abused its discretion by not finding that appellees demonstrated an "evasion and total avoidance of responsibility" in not timely responding to appellants' interrogatories because they subsequently moved for a protective order thereby demonstrating their responsibility in respect to discovery. Therefore, the trial court did not err by refusing to dismiss appellees' claim because they did not timely respond to appellants' interrogatories.

Appellants also claim in their first assignment of error that the trial court improperly granted appellees' motion for a protective order pursuant to Civ. R. 26(C). The trial court held that appellees did not have to supply appellants with the names and addresses of the patients who had

visited Toledo Medical Services and also the names and addresses of employees who worked at Toledo Medical Services. Appellees filed their motion for a protective order after the time for responding to appellants' interrogatories had run. However, it is within the trial court's discretion to grant an untimely motion for a protective order. Rogers v. Kazee (1983), 10 Ohio App. 3d 139. The granting of a protective order can be overturned on appeal only upon a finding that the trial court abused its discretion in granting the protective order. Otero v. Buslee (C.A. 10, 1982), 695 F. 2d 1244. In the case sub judice, the names and addresses of Toledo Medical Services' patients and employees may have been viewed by the trial court as non-discoverable for many different reasons. As to the names and addresses of the patients, the trial court could very well have found that this information fell within the physician-patient privilege and

was therefore confidential and not discoverable. The trial court could have also found that the names of the patients and employees were not relevant to the case. The trial court could have found also that in light of appellants' previously demonstrated zealous convictions over the issues involved, that if appellants would have received the names and addresses of the patients and employees they may have misused this information to the detriment of those patients and employees. For the foregoing reasons, we determine that the trial court did not abuse its discretion in granting appellees' motion for a protective order relieving them of supplying the appellants with the names and addresses of patients and employees of Toledo Medical Services.

For the foregoing reasons, we find appellants' first assignment of error not well-taken.

For appellants' second assignment of

error, they contend that the trial court made numerous improper evidentiary rulings. Initially, appellants argue that the trial court erred in allowing Dr. Armstrong to testify that he owned four units of Fairfield Commons because they claim that his ownership could only be proven by an original deed. Appellants claim that the best evidence rule controls this situation and as such, the trial court's finding that Dr. Armstrong owned four units of Fairfield Commons was erroneous because the court did not insist on having appellees produce the original deeds. Appellants' reliance on the best evidence rule as it is codified in Evid. R 1002 is misplaced. That rule states:

> "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio."

This rule comes into effect only when there is an attempt to prove the content of a writing. It does not require that a writing must be produced where a fact can be proved by a writing. Appellants seem to argue that the best evidence rule requires that a party must use the very best evidence available to prove a fact. The best evidence rule as embodied in Evid. R. 1002 simply means that if an individual intends to prove the content of a specific writing, the original of that writing should be used.

Appellee, Dr. Armstrong, testified that he owned four condominium units in Fairfield Commons and appellants provided no evidence to the contrary. Dr. Armstrong was not required to prove his ownership via deed because all he was required to prove to maintain the instant action was that he has a superior right can be shown by "acts of ownership and dominion" or simply by testimony to that effect. See Pearl v. Pic

Walsh Freight Co. (1960), 112 Ohio App. 11, 12. Appellants are incorrect in asserting that Dr. Armstrong had to produce an original deed in order to maintain this action.

Relevant to the second assignment of error, appellants also claim that appellees had to produce an original copy of the condominium association's declaration of condominium property and also an original written agreement allowing Dr. Armstrong to act as the association's agent in pressing this lawsuit, again somehow based on the best evidence rule. These contentions are wholly without merit. As we noted above, the best evidence rule on Ohio simply means that if a party seeks to prove the content of a writing, he should produce the original of that writing at court. It does not mean that a party must prove a fact with the best evidence possible. Aside from the fact that the best evidence rule is not applicable in this circumstance,

appellants' argument fails for additional reasons. First, Dr. Armstrong did not have to prove he was acting as agent for the Fairfield Commons Condominium Association in order for him to be a proper party to this suit as he had standing as the owner of the condominium units which were being picketed by appellants. Second, the doctor testified that he represented the interests of the association and appellants failed to put forth any evidence that disputed this. Third, appellants never put the existence of the condominium association into issue thereby making proof of its existence unnecessary. Lastly, appellants never made timely objections on these issues at trial where appellees could have presented evidence on these issues, instead they raised these issues for the first time on appeal. The trial court did not err by failing to require appellees to introduce into evidence an original copy of the association's declaration of condominium

property and an original written agreement allowing Dr. Armstrong to act on behalf of the association.

Next, appellants urge that the trial court erred by admitting testimony relative to dates of alleged trespasses of appellant Reed which dates were not included in appellees' answer to appellant Reed's interrogatories. In the interrogatories submitted by appellant Reed to appellees on February 29, 1984, she asked appellees to list the dates that she had allegedly trespassed on appellees' property and thereby violated the restraining orders. In response to appellant Reed's interrogatories, appellees listed nineteen dates that Ms. Reed was on appellants' property in violation of the restraining orders. During trial, the trial court allowed testimony relevant to appellant Reed's violation of the reestraining orders on dates which were not included in the answers to appellant Reed's interroga-

tories. However, the trial court did prohibit some testimony relevant to Ms. Reed's violation of the restraining orders on dates that were not included in the answers to appellant Reed's interrogatories. Again, this is an area where sanctions for non-compliance with discovery should be utilized only in extreme situations. The Summit County Court of Appeals has held that "the exclusion of reliable and probative evidence is a severe sanction and should be invoked only when clearly necessary to enforce wilfull non-compliance or to prevent unfair surprise." Nickey v. Brown (1982), 7 Ohio App. 3d 32, 34. Appellants have failed to show that the dates testified to but not included in the answer to the interrogatories was a result of wilfull non-compliance nor have they shown how they have been unfairly surprised by the testimony on the excluded dates. However, even if all the testimony relevant to appellant

Reed's violation of the restraining orders on the dates not listed in the answer to her interrogatories should have been excluded, the inclusion of the testimony relevant to those dates was not reversible error. There was an overwhelming amount of credible evidence introduced at trial, including admissions by appellant Reed herself, that Ms. Reed had repeatedly violated the restraining orders by going onto appellees' property and even into the Toledo Medical Services' suite. Therefore, even if it were error for the trial court to allow testimony concerning dates that appellant Reed had violated the restraining orders, which dates were not included in the answers to her interrogatories, that error was haemless.

Appellants' last argument in respect to their second assignment of error is that the trial court erroneously admitted photographs without the photographer, who took the photographs, saying the magic

words that the photographs were "a fair and accurate depiction" of the scene. The photographs in question (exhibits 3-13), were taken by a professional photographer at the behest of appellees. The photographer was called to testify and he stated that he had taken the pictures and he also attempted to describe the location of the individuals that were in the pictures. The photographer never explicitly stated that the photographs were "a fair and accurate depiction," of the scene as he saw it that day. However, this was implicit in the photographer's testimony because he attempted to describe the photos and never indicated that they were not an accurate depiction of the scene at the time he took the pictures. Additionally, appellants never disputed the accuracy of the photos and in fact appellants counsel stated that "the pictures speak for themselves" thereby implying that the photographs were accurate. However, even if the photographs were

erroneously admitted into evidence, that admission is not grounds for reversal. As with the testimony about dates not included in the answers to appellant Reed's interrogatories, the admission of these photographs is at most harmless error because there was so much overwhelming evidence of the appellants' violations of the restraining orders that these photographs were merely surplusage.

For the foregoing reasons, we find appellants' second assignment of error not well-taken.

For their third assignment of error, appellants contend that the issuance of the permanent injunction is an infringement on their First Amendment rights. Appellants break down this assignment of error into three subdivisions; however, the first two subdivisions are in reality the same issue and will be considered together. The crux of appellants' argument in this regard is that the trial court erred in finding that

the Fairfield Commons Condominium complex is private property from which appellees have a legal right to exclude appellants.

The Fairfield Commons Condominium complex consists of three buildings. They are set in a northerly line from Monroe Street which street runs east and west in the city of Toledo, Lucas County, Ohio. The first building is approximately two hundred feet from the center of Monroe Street, the second building is approximately three hundred fifty feet from the center of Monroe Street, and the third building is approximately four hundred fifty feet from the center of Monroe Street. Toledo Medical Services, which is where abortions are performed and which is the object of appellants' protest, is located within the second building. A driveway, which is about thirty feet wide, enters off Monroe Street, crosses a public sidewalk, and then continues back to a parking lot which fronts and is on the east side of the three

buildings. The parking lot is used solely for the three office buildings of the condominium comples. There is a "private property, no trespassing" sign on the driveway leading into the parking lot. The public sidewalk is approximately four feet wide and is the area in which the appellants are allowed to carry on their protest under the restraining orders.

The condominium complex buildings house only professional offices such as psychiatrists, attorneys, dentists and physicians. The professionals within the complex treat their clients and invite them onto the premises by appointment only. The entire condominium complex is located in one of the, if not the, largest commercial areas in the city of Toledo, Lucas County, Ohio.

Appellants argue that Fairfield Commons Condominium complex is imbued with a public purpose and as such appellees cannot prohitit them from picketing on

their property because to do so would infringe on appellants' First Amendment rights. Appellants rely on the United States Supreme Court case of Amalgamated Food Employees Union, Local 590 v. Logan Plaza (1968), 391 U.S. 308, in supporting their claim that they have a right to picket on appellees' property and not be confined to the public sidewalk. In Logan the court addressed the issue of whether owners of a shopping mall could exclude individuals from picketing on that mall's property. The court held that the individuals could not properly be excluded but that case must be viewed solely in light of the specific facts presented there. The court recognized that in a different factual context an individual's rights in private property would outweigh other individuals' First Amendment rights. The court stated:

> "All we decide here is that because the shopping center serves as the

> community business block 'and is freely accessible and open to the people in the area and those passing through,' Marsh v. Alabama, 326 U.S., at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put. *** Thus where property is not ordinarily open to the public, this Court has held that access to it for the purpose of exercising First Amendment rights may be denied altogether." 391 U.S. at 319, 320.

The court in Logan seemed to focus on the concept that the mall in question there was the functional equivalent of a business district and the sidewalks leading from building to building within the mall were "the functional equivalents of the streets and sidewalks of a normal municipal business district." Id., at 319. The court reasoned that since the mall is a functional equivalent of a business district it should be treated as a public forum where individuals could not be prohibited from expressing their views.

Subsequent to Logan, the Supreme court decided Lloyd Corporation v. Tanner (1972), 407 U.S. 551. The Lloyd case likewise dealt with the constitutionality of excluding picketers from a shopping mall. The majority opinion written by Justice Powell in this sharply divided decision seemed to question the Logan court's reliance on the functional equivalence test. The following passage from Justice Powell's majority opinion can best be described as the current status of the law in this area:

> "The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations of state action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this

case. They provide that '[n]o person shall *** be deprived of life, liberty, or property, without due process of law.' There is the further proscription in the Fifth Amendment against the taking of 'private property *** for public use, without just compensation.'

"Although accomodations between the values protected by these three Amendments are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speaking, picketing, or other communicative activities. ***

***

"Respondents contend, however, that the property of a large shopping center is 'open to the public,' serves the same purposes as a 'business district' of a municipality, and therefore has been dedicated to certain types of public use. The argument is that such a center has sidewalks, streets, and parking areas which are functionally similar to facilities customarily provided by municipalities. It is then asserted that all members of the public, whether invited as customers or not, have the same right of free

speech as they would have on the similar public facilities in the streets of a city or town.

"The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, Marsh v. Alabama, supra, involved the assumption by a private enterprise of all the attributes of a state-reated municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power.

"Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center. This is not to say that no differences may exist with respect to government regulation or rights of citizens arising by virtue of

> the size and diversity of activities carried on within a privately owned facility serving the public. There will be, for example, problems with respect to publichealth and safety which vary in degree and in the appropriate government response, depending upon the size and character of a shopping center, an office building, a sports arena, or other large facility serving the public for commercial purposes. We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think thses fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear.
>
> "We hold that there has been no such dedication of Lloyds privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." (Emphasis in original.) 407 U.S. at 567-570.

From the above-quoted passage this court concludes that where property has fewer attributes of being public in nature than a shopping mall, such as in the case

sub judice, the property owner's rights weigh more heavily in the balance than an individual's First Amendment rights. Since the trial court could have properly found that the property at issue in a case sub judice had more indicia of privateness than the shopping mall in Lloyd, the trial court did not err in issuing a permanent injunction enjoining appellants from picketing on appelles' property and confining appellants' protest to the public sidewalk in front of appellees' property.

Appellants' next contention is that the trial court erred by issuing a permanent injunction enjoining appelants' picketing at appellee Dr. Carl Armstrongs residence. Applying the principle set forth in Lloyd, supra, the more attributes property has of being private the stronger the individual owners' private property rights are in relation to others First Amendment rights to picket on that property. Not only are Dr. Armstrong's prop-

erty rights being infringed by appellants' picketing, but also his right to privacy. Dr. Armstrong's property rights and rights to privacy clearly outweigh appellants' First Amendment right to picket on that property. See Pipe Machinery Co. v. DeMore (1947), 49 Ohio Law Abs. 536.

For the foregoing reasons, we find appellants' third assignment of error not well-taken.

For the fourth assignment of error, appellants' assert that certain of the trial court's findings of fact were against the manifest weight of the evidence. First, appellants assert that appellees were not entitled to damages because they proved none. It is well-settled Ohio law that once a party proves that he has been trespassed against that party has a right to nominal damages without specifically proving actual damages. See Pearl v. Pic Walsh Freight Co., supra. Once appellees proved that they had a superior right to

possession and that appellants came upon their property without permission, they had established a prima facie case of trespass and were entitled to nominal damages. As stated before, Dr. Armstrong testified that he was the owner of four units at Fairfield Commons thereby showing he had a superior right to possession than appellants and there was an overwhelming amount of testimony that appellants had come on to appellees' property without permission. This evcidence established a prima facie case of trespass and since appellants did not effectively dispute this evidence, the trial court did not err in finding appellants guilty of trespass and awarding damages.

Next, appellants assert that appellees were not entitled to attorney fees because the awarding of attorney fees is proper only where a party's conduct has been outrageous. Virtually uncontradicted evidence was presented that the majority of

the appellants had repeatedly violated the restraining orders and picketed on appellees' property. The trial court did not err in awarding attorney fees.

Lastly, appellants assert that the trial court erred by treating all defendants the same as to jail sentences, as well as assessing fees and costs equally. Appellants specifically argue that the finding bvy the trial court that J. Gaski, J. Ganzel, and K. Moriarity had violated the restraining orders was against the manifest weight of the evidence. The standard a reviewing court should employ in the face of assertions that a judgment is against the manifest weight of the evidence was set out in C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St. 2d 279, syllabus of the court, as follows:

> "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the

evidence."

See, also, Season Coal Co. v. Cleveland (1984), 10 Ohio St. 3d 77.

In order for a court to find an individual in contempt for violation a restraining order, the court must find that first the individual had notice of the restraining order and, second, that the individual did an act in violation of the restraining orders. All appellants had notice of the restraining orders. As to K. Moriarity, there was conflicting evidence as to whether she violated the restraining orders. However, there was competent, credible evidence going to this issue presented by appellees that she did violate the restraining orders. The the trial court's finding that K. Moriarity was in contempt was not against the manifest weight of the evidence.

As to J. Ganzel and J. Gaski, there was absolutely no evidence put forward that they violated the express terms of the

restraining orders and in fact there was a stipulation entered into by the parties that these two individuals did not violate the restraining orders. the finding by the trial court that J. Gaski and J. Ganzel violated the restraining orders was against the manifest weight of the evidence and as such appellants' fourht assignment of error as to those two individuals is found well-taken. As to all other individuals, appellants' fourth assignment of error is found not well-taken.

For the fifth assignment of error, appellants claim that the trial court erred by bifurcating the trial on the issues of the permanent injunction and the contempt from the issue involved in appellant Reed's counterclaim. As was stated supra, appellees' cause of action seeks a permanent injunction against appellants' picketing activity on appellees' property and the recovery of the costs of the action. The contempt proceeding was to determine

whether appellants should be held in contempt for violation of the temporary restraining orders and preliminary injunctions. Appellant Reed's counterclaim filed on November 30, 1983, sought injunctive relief, compensatory damages, and punitive damages for the alleged mental distress inflicted upon appellant Reed by appellee Dr. Armstrong. The infliction of the mental distress is alleged to have occurred by the conduct of Dr. Armstrong of damaging appelllant Reed's personal property on the dateof October 6, 1983. Appellant Reed requested a jury trial in her counterclaim which request was later granted. After a hearing on the issue, the trial court held that the issues raised by appellee's complaint and the motion to show cause were predominately equitable in nature, that appellant Reed's counterclaim was predominately an action at law, that the permanent injunction issue and the contempt issue should be tried together and, that

the issues presented by appellant Reed's counterclaim should be bifurcated from the other two issues and a separate jury trial would be had on appellant's counterclaim after a trial to the court was had on the issue of the permanent injunction and the contempts.

Civ. R. 42(B) allows a court to bifurcate a trial and allow separate trials of different issues. That rule reads:

> "Seperate Trials. The court, after hearing, in furtherance of convenience or to avoid prejudice, wherein seperate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third party claims, or issues, always preserving inviolate the right to trial by jury."

A trial court is in the best position to ascertain whether a bifurcation of the issues is necessary and that court therefore, has broad discretion in doing so. See Heidbreder v. North Hampton Twp. Trustees (1979), 64 Ohio App. 2d 95. In the case sub judice, the issues raised by

appellees' complaint for an injunction and their motion for appellants to show cause why they should not be held in contempt, were to be tried before the court whereas, appellant Reed's counterclaim seeking damages was to be tried to the court and others to be tried to a jury made this case an ideal one for bifurcation. First, if the trial were not separated, the jury impanelled for appellant Reed's counterclaim may have become confused as to what issues and facts they were to decide. Second, it would be very inconvenient to the parties not involved in appellant Reed's counterclaim to have to attend the days of trial which solely addressed the issue of appellant's counterclaim. Third, due to the emotionally charged nature of the issues involved, it may have been prejudicial for the jury to hear evidence which was relevant solely to the injunction and contempt issues. For all the foregoing reasons, the trial court did not abuse its

discretion in bifurcation the injunction and contempt issues form the emotional distress issue raised in appellant Reed's counterclaim. We find appellants' fifth assignment of error not well-taken.

As a sixth assignment of error, appellants claim that the trial court erred in not finding that their trespasses and violations of the restraining orders were justified by necessity. Appellants subdivide this assignment of error into three divisions. It will not be necessary to address each subdivision separately because all revolve around the same argument. Appellants' argument in this regard is simply that their attempts to stop abortions from taking place on appellees' property is a legal necessity which justifies their trespass in violation of the trial court's restraining orders.

The United States Supreme Court has found that abortions are not illegal. Roe v. Wade (1973), 410 U.S. 113. Protesting

such activity was found by the trial court in the instant case not to constitute a necessity justifying appellants' activities. The trial court did not err in failing to find that appellants' activities were justified by a legal necessity. Appellants' sixth assignment of error is not well-taken.

Upon consideration whereof, we find that substantial justice has not been done all the parties complaining. Specifically, we find that the trial court was in error in finding John E. Gaski and Joseph A. Ganzel in contempt for violation of that court's restraining orders. Therefore, we reverse the trial court's finding only so far as that court held John Gaski and Joseph Ganzel in contempt. This cause is remanded back to the trial court for a modification of its award of damages and any further proceedings not inconsistent with this decision. Costs to be shared equally, one-half to appellants and one-

half to appellees.

JUDGMENT REVERSED, IN PART, AND AFFIRMED, IN PART.

CONNERS, P.J., and WILKOWSKI, J., concur.

The term restraining orders will collectively refer to both the temporary restraining orders and preliminary injunctions issued against appellants.

IN THE COURT OF APPEALS
OF LUCAS COUNTY

Fairfield Commons Condominium & Carl Armstrong, M.D.
APPELLEES

COURT OF APPEALS NO. L-85-013

TRIAL COURT NO. CV 83-1905

v.

John M. Stasa, Antoinette & Kathleen Moriarity, Marjorie Reed, Joseph & Marjorie Ganzel, John E. Ganzel, John E. Gaski, Marygrove Catholics United for Life
APPELLANTS

JOURNAL ENTRY

DATE November 29, 1985

Finding appellants' of error Nos. 1, 2, 3, 5 and 6 not well-taken, and furtherfinding appellants' assignment of error No. contempt well-taken, but finding the remainder of that assignment of error not well-taken, judgment of the Lucas County Common Pleas Court is reversed only so far as that court held John Gaski and Joseph Ganzel in contempt. Each and every other finding of that court is hereby affirmed.

This cause is remanded to the trial court for modification of its awaerd of damages and any further proceedings not inconsistent with this opinion and for assessment of costs. Costs assessed equally between the parties. See Opionion by Wiley, J., on file.

A certified copy of this entry shall consititute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1180

John J. Connors, Jr., P.J.,
PRESIDING JUDGE

Arthur Wilkowski, and
JUDGE

Frank W. Wiley, JJ.,
JUDGE

CONCUR.

Judge Frank W. Wiley,m retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

STATE OF OHIO )
(SS:
COUNTY OF LUCAS (

IN THE COURT OF COMMON PLEAS
CASE NO.
83-1905

FAIRFIELD COMMONS CONDOMINIUM ASSOCIATION, et al.,

Plaintiffs,

vs.

JOHN M. STASA, et al.,

Defendants.

JUDGMENT ENTRY

JOHN L. MAXWELL, JUDGE:
(Sitting by Assignment from Cuyahoga County)

This cause came on for hearing September 5, 1984 to September 7, 1984, upon the evidence, pleadings, arguments and briefs.

The issues before the Court are:

I. Whether the Defendants have the right to be on the Plaintiffs' property at Fairfield Commons to pray, protest against abortion adn attempt to dissuade persons from obtaining abortions as an exercise of their rights to freedom of speech and

rights to express their religious beliefs?

II. Whether the Defendants have the right to extend their picketing and protest activities to the private residence of Plaintiff Carl Armstrong?

III. Whether the Defendants, or any of them, individually or collectively, ought to be punished for contempt or contempts for disobeying the Temporary Restraining Orders and subsequent Preliminary Injunctions issued by the Court herein?

Upon due consideration, the Court hereby concludes that:

Based upon the foregoing and the admissible evidence adduced at the trial on the merits, Fairfield Commons is a condomimium office complex and is, as such, private property. The Plaintiffs have the legal right to exclude the Defendants and those with them form protesting and picketing on the property. The Plaintiffs have no adequate remedy at law and are entitled to having the Preliminary Injunc-

tions heretofore issued herein made permanent.

The Plaintiff Dr. Carl Armstrong, is entitled to a permanent injunction prohibiting the Defendants and those with tem from picketing and protesting at his private residence since a more appropriate forum for the Defendents to air their anti-abortion views exists.

The Defendants have repeatedly disobeyed the Temporary Restraining Orders and subsequent Preliminary Injunctions issued herein and must be punished therefor.

The Court finds that:

1. Fairfield Commons is a Condominium office complex located at 5162, 5164 and 5166 Monroe Street in the City of Toledo, Lucas, Ohio. There are three buildings containing twenty offices units. The office complex is privately owned as Condominium property and Plaintiff Armstrong owns four units he leases to Toledo Medical Services, Inc.,, and is a repre-

sentative of the Plaintiff, Fairfield Commons Condominium Association.

2. The other sixteen office units are occupied by professionals which generally invite clients and patients on to the property by appointment only, such as psychologists, physicians, dentists, insurance agents, attorneys, oral surgeouns and consultants. There are no retail shops or stores which are open to the general public.

3. The buildings of the complex do not front on Monroe Street but fromt on an internal parking lot with access thereto by a sinle driveway (which is part of the property) running from Monroe Street to the internal parking lot. Connecting the parking lot to the offices are a series of sidewalks. The parking lot and these sidewalks are on the internal private portion of the property.

4. There is a public sidewalk adjacent to Monroe Street and crossing the driveway leading to Fairfield Commons. There is a sign posted at the side of the driveway leading to the parking lot putting persons on notice that Fairfield Commons is "Private Property, No Trespassing.)

5. The Defendants, and others, join together at Fairfield Commons to protest abortions being conducted by Toledo Medical Services, to attempt to dissuade its patients from utilizing its services, to pray and "save babies and mothers."

6. The protestors have an informal group calling itself the Marygrove Catholics United for Life which is guided or coordinated in its protests at Fairfield Commons by the Defendant, John M. Stasa, aided by his wife, Cheryl, a non-party, Defendant Antoinette Moriarity and Defendent Marjorie Reed.

7. The protest activities of the group are advertised by word of mouth and announcements in church bulletins, placed therein by Defendant Antoinette Moriarity, similar to that found in Plaintiffs' Exhibit. The bulletin message states that the group meets every Saturday morning at Fairfield Commons.

8. On and after March 19, 1983, Defendants Mr. Stasa, Mr and Mrs. Gaski came into the internal parking lot and sidewalks of the propery and conducted picketing activities. Since then, the Defendants have been joined by the others and such picketing and protesting has

continued on the private property despite the Temporary Restraining Orders and subsequent Preliminary Injunctions issued herein.

9. The Defendant protestors admitted that their purpose in dissuading the patients from entering the medical clinis.

10. Since March 19, 1983, the Defendants have been joined by others on the internal parking lot and sidewalks of the property to parade, to pass out literature, to engage patients in conversation, sometimes shouting at patients and staff members, sometimes using a "bullhorn" to amplify theirmessage; to block patients' path resulting in staff members of Toledo Medical Services to required to physically escort the patients into the clinic.

11. On occasions since the Temporary Restraining Orders and Preliminary Injunctions have been issued, the Defendants and

others with them have stopped traffic entering the property and on one occasion held a 20 foot banner across the driveway to impede such traffic from entering. The Defendants have admitted that this poses a traffic hazard and danger to vehicles and pedestrians.

12. On 21 occasions since the Temporary Restraining Orders and Preliminary Injunctions were issued against her, Defendant Reed has been on the property to conduct her anti-abortion activities and on 7 of those occasions had to be removed from the clinic itself.

13. Since the respective Temporary Restraining Orders and Preliminary Injunctions were issued, Defendant Mrs. Moriarity has been on the property on 5 occasions, Kathleen has been on the property on 1 occasion, Mrs. Ganzel has been on the property on 2 occasions.

14. On occasion, while one or more of the Defendants and others with them lend

support by standing on adjacent properties.

15. Although the property is in the vicinity of the Franklin Park Mall, it is not a part of that mall.

16. On and after October 9, 1983, the Defendants, Mrs. Reed and Mrs. Moriarity and her family, along with others, have conducted their anti-abortion activities at the private residence of Plaintiff, Dr. Armstrong.

17. The Defendant, Mrs. Reed, stated tat she is not subject to governmental law, but subject to God's law.

18. All the Defendants are motivated in their anti-abortion activities at the property by their religious beliefs against abortion.

19. Since March 19, 1983, the foregoing activities of the protestors at Fairfield Commons have been continuous on a weekly basis. The Defendants' activities are disruptive to the Toledo Medical

Services, as well as other occupants of the complex and such activities have necessitated calling in the police on numerous occasions.

And the Court further finds:

1. The Plaintiffs have the legal right and standing to bring this action and request the relief sought.

2. The injunction relief sought is an appropriate remedy inasmuch as the Plaintiffs do not have an adequate remedy at law by virtue of the repeated and continuous nature of the trespasses complained of.

3. The Temporary Restraining Orders and subsequent Preliminary Injunctions issued herein are valid orders of this Court and are enforceable.

4. Although the Defendants have the right to exercise their individual freedom of speech, their right to peacefully assemble and their right inherent therein to distribute literature; under the facts

presented in this case, the Defendants' activities have exceeded the protected bounds of those rights by trespassing upon private property, interfering with the free flow of vehicular and pedestrian traffic, interfering with the right to privacy of a woman seeking an abortion and in engaging in activities which are disruptive to the entire office complex.

5. Although the Defendants' anti-abortion activities are prompted by religious beliefs and their right to hold such beliefs is inviolate, their right to exercise such religious beliefs and conduct activities in pursuance thereof is subject to restraints imposed by law. As such, the rights of the Defendats to act upon their religious beliefs must be balanced against the equally protected rights of others.

6. Fairfield Commons, being an office complex and not being an integral part of the nearby shopping mall, cannot be considered as a "regional shopping mall" so

as to extend whatever rights may be available to persons seeking to exercise their right to freedom of speech in a "regional shopping mall."

7. Under the facts of this case, there is no "emergency" taking place upon the property at Fairfield Commons; therefore, the Defendants have no defense available to them. The Defendants, having shown no other excuse or right to be upon the property, the conclusion must be drawn that the Defendants are trespassers.

8. Because the Defendants have crearted a dangerous situaticn by interfering with vehicular traffic in the driveway of Fairfield Commons, they cannot now complain that the rights of others should be diminished or our laws be changed to accommodate their needs to lessen such danger. To the contrary, the activities of the Defendants must be changed to eliminate the dangerous situation which they created or made worse.

9. The Court has no duty to diminish the rights of others in order to assist the Defendants in becoming more persuasive or more effective in their exercise of freedom of speech. The Defendants are limited to the traditional forums and methods protected by law for that purpose. The public sidewalk along Monroe Street is an adequate forum for the Defendants to attempt to deliver their message and persuade the public; however such forum must be utilized consistent with the restraints imposed thereon by law.

10. The private residence of Plaintiff, Dr. Carl Armstrong, is not a proper forum for the Defendants to express their anti-abortion beliefs when weighted against said Plaintiff's right to privacy and his right to the peaceful enjoyment of his property. The proper forum for the Defendants to express their views is confined to the proximity of the subject of their protests, that being the public sidewalk

along the property wherein the abortion clinic is stituated. Said Plaintiff is entitled to injunctive relief therefor.

11. Based upon the facts of this case, the Defendants Marjorie Reed, Marjorie Ganzel, John Stasa, Antoinette Moriarity and Kathleen Moriarity have, on occasions and in the manner outlined in Issue III, disobeyed the respective Temporary Restraining Orders and Preliminary Injunctions issued herein and ought to be punished therefor as this Court shall determine.

12. The Defendants not named in the foregoing paragraph who were equally restrained by the orders of this Court shred in the same purpose as those Defendants named in the foregoing paragraph and are thereby equally culpable for the acts of disobedience of those Defendants.

13. The Court has the authority to punish the Defendants for their actings of contempt, has the authority to assess the

costs of those proceedings, against the Defendants and to award damages to the Plaintiffs, including reasonable attorneys' fees, among other things and such shall be done as this Court may determine.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the Preliminary Injunction be and is hereby adopted and ordered permanent and in full force and effect.

And it is further ordered that the Defendants are permanently enjoined from any activities in the vicinity of private residence of Plaintiff, Dr. Carl Armstrong, and are ordered to confine their activities to the public sidewalk along the property wherein the Plaintiffs' clinic is situated, and

Each Defendant is hereby fined Ten and 00/100 Dollars ($10.00) each, and the Court sentences each Defendant to one day in the County Jail. However, the Court suspends the jail sentence subject to

strict compliance with the Permanent Injunction.

The Plaintiff is awarded Judgment in the amount of Twenty-five Hundred and 00/100 Dollars ($2500.00) against all Defendants for Attorney Fees. Each Defendant is assessed an equal amount of the Judgment.

The Defendats shall pay all Court Costs.

_____

JUDGE JOHN L. MAXWELL
(Sitting by Assignment
from Cuyahoga County

Dated: _____, 1984.

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

Fairfield Commons Condominium Association, et al., : Case No. 83-1905

Plaintiffs, :

vs. : TEMPORARY RESTRAINING ORDER

John M. Stasa, et al:

Defendants. :

:

This cause came on to be heard on plaintiffs' motion for a temporary restraining order and certificate of plaintiffs' counsel refarding attempted notice to defendants thereof and it appearing to the Court that the defendants are committing acts and/or are about to commit acts as set forth in Plaintiffs' verified Complaint and will continue to do so unless restrained by order of this Court and that immediate and irreparable injury, loss or damage will result to plaintiffs before notice can be given and they or their attorney can be heard in opposition,

it is

ORDERED, that John M. Stasa, John E. Gaski, Marjorie G. Ganzel, Joseph A. Ganzel, be and are hereby restrained from, in any manner, either directly or indirectly, interfering with Plaintiffs' property or business in the following respects:

a. Entering, assembling, soliticiting or picketing upon the private sidewalks, parking lot and grounds of the Fairfield Commons located at 5162, 5164 and 5166 Monroe Street in the City of Toledo, Lucas County, Ohio;

b. Hindering, obstructing, blocking or otherwise interfering with vehicular and pedestrian access to and from the aforesaid property;

c. Conducting picketing, assembly or solicitation on any part of

the aforesaid property other than on the public sidewalk adjacent to Monroe Street near the property and in a manner which shall not hinder, obstruct, block or otherwise interfere with vehicular and pedestrian access to and from the aforesaid property.

provided that Plaintiffs first give security in the sum of $100.00 for the payment of such costs and damgages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Such bond to be approved by the Court or by the Clerk of Courts; and it is further

ORDERED, that this order expire within fourteen days after entry unless within such time, the order, for good cause shown is extended, or unless the Defendants consent that it may be extended for a longer period; and it is further

ORDERED, that Plaintiffs' application for preliminary injunction be assigned for hearing by consent on the 29th day of August, 1983, at 1:30 o'clock P.M. in Courtroom 3 ; and it is further

ORDERED, that copies of this order and of Plaintiffs' Complaint and the certifications submitted with it, together with proper summons issuing be served by the Sheriff of Lucas County, Ohio, upon the Defendants.

Issued at 4:20 o'clock P.M., August 11 , 1983.

/s/Francis C. Restivo
JUDGE

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

Fairfield Commons Condominium Association, et al., : Case No. 83-1905

Plaintiffs, :

vs. : TEMPORARY RESTRAINING ORDER

John M. Stasa, et al:

Defendants. :

This cause came on to be heard on September 8, 1983 on Plaintiffs' motion for temporary restraining order against three additional Defendants herein, Antoinette Moriarity, Kathleen Moriarity, a minor, and Morjorie Reed, who appeared in open Court and acknowledged that they had received service of summons and a copy of the Complaint herein but had not yet obtained the services of legal counsel although it is their desire to do so. It appearing to the Court that these additional Defendants are committing acts and/or are about to commit acts as set forth in Plaintiffs' verified Complaint and will continue to do so unless restrained by order of this Court

and that immediate and irreparable injury, loss or damage will result to Plaintiffs before notice can be given and they or their attorney can be heard in opposition, it is

ORDERED, that Antoinette Moriarity, Kathleen Moriarity, a minor, and Marjorie Reed be and are hereby restrained from, in any manner, either directly or indirectly, interferring with Plaintiffs' property or business in the following respects:

a. Entering, assembling, soliciting or picketing upon the private sidewalks, parking lot and grounds of Fairfield Commons located at 5162, 5164 and 5166 Monroe Street in the City of Toledo, Lucas County, Ohio;

b. Hindering, obstructing, blocking or otherwise interfering with vehicular or pedestrian access to or from the a foresaid property;

c. Conducting picketing, assembly or solicitation on nay parts of the aforesaid property other than on the public sidewalk adjacent to Monroe Street near the property and in a manner which will not hinder, obstruct, block or otherwise interfere with vehicular and pedestrian access to and from the a foresaid property; and it is further

ORDERED, that the Plaintiffs' security in the sum of $100.00 deposited with the Clerk of Court herein on August 11, 1983 be extended hereto for the payment of

such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained; and it is further

ORDERED, that this order expire within fourteen days after entry unless within such time, the order, for good cause shown is extended, or unless the said Defendants consent that it may be extended for a longer period; and it is futher

ORDERED, that Plaintiffs' application for preliminary injunction be assigned for hearing on the 22nd day of September, 1983 at 9:00 o'clock A.M. in Courtroom #3; and it is further

ORDERED, that copies of this Order be served by the Sheriff of Lucas County jupon the additional Defendants herein, Antoinette Moriarity, Kathleen Moriarity, a minor, c/o James Moriarity, her father, and Marjorie Reed.

Issued at 3:30 o'clock P.M., September 8, 1983.

/s/Michael A. Rumer
JUDGE

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

FAIRFIELD COMMONS CONDOMINIUM ASSOCIATION, et al

Plaintiffs Case No.83-1905

-vs-

JOHN M. STASA, et al

Defendants MEMORANDUM DECISION

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This cause came on for hearing upon Plaintiffs' Motion for Preliminary Injunction against Defendants, John M. Stasa, Marygrove Catholics United for Life, John E. Gaski, Marjorie G. Ganzel and Joseph A. Ganzel, (the "Original Defendants") on September 8, 1983. All parties were present in open Court and represented by counsel. After presentation of testimony on behalf of the Plaintiffs and the Original Defendants, the Court issued the Preliminary Injunction conditioned upon the filing of Post-hearing Briefs by September 12, 1983, and the matter was taken under

advisement.

Based upon the testimony adducced the Court makes the following findings:

1. Fairfield Commons is Condominium office complex located at 5162, 5164, and 5166 Monroe Street in the City of Toledo, Lucas County, Ohio. There are three buildings containing twenty office units. The office complex is privately owned as Condominium property and Plaintiff Armstrong, owns four units which he leases to Toledo Medical Services, Inc., a medical clinic.

2. The other sixteen office units are occupied by professionals which generally invite clients and patients on to the property by appointment only, such as psychologists, attorneys, oral surgeons and sonsultants. There are no shops or stores which are open to the general public.

3. The buildings of the complex do not front on Monroe Street but front on an internal parking lot with access thereto by a single driveway running from Monroe Street to the internal parking lot. Connecting the parking lot to the offices are a series of sidewalks. The parking lot and these sidewalks are on the internal private portion of the property.

4. There is a public sidewalk adjacent to Monroe Street and crossing the driveway leading to Fairfield Commons. In March, 1983, a sign was posted at the side of the driveway leading to the parking lot putting persons on notice that Fairfield Commons is "Private Property, NHo Trespassing."

5. The Defendants and others,m join together at Fairfield Commons to protest abortions being conducted by Toledo Medical Services, to attempt to dissuade its patients from utilizing its service, to pray and "save babies and mothers".

6. The protestors have an informal group calling itself the Marygrove Catholics United for Life which is guided or coordinated in its protests at Fairfield Commons by the Defendant, John M. Stasa, aided by his wife, Cheryl, a non-party.

7. The protest activities of the group are advertised by word of mouth and by announcements in church bulletins similar to that found in Plaintiffs' Exhibit 3. The bulletin message states that the group meets every Saturday morning at Fairfield Commons.

8. Prior to March 19, 1983, the Defendants and other members of the group joining in purpose to confined their picketing and protests to the public sidewalk adjacent to Monroe Street. On

March 19, 1983, the original Defendants came into the internal parking lot and sidewalks of the property and conducted picketing activities.

9. On March 19, 1983, the police were called and after repeated requests and repeated refusals by the Defendants, the police removed the original Defendants from the property and arrested them for criminal trespass.

10. The protestors admitted that their purpose in entering the internal parking lot was to be more effective in dissuading the patients from entering the medical clinic.

11. Since March 19, 1983, the original defendants have been joined by others on the internal parking lot and sidewalks of the property to parade, to pass out literature, to engage patients in conversation, sometimes shouting at patients and staff members; to block patients' path resulting in staff members of Toledo Medical Services to be required to physically escort the patients into the clinic.

12. Since March 19, 1983, the foregoing activities of the protestors have been continuous on every Saturday morning and sometimes on Thursday mornings. The defendants activities are disruptive to the Toledo Medical Services, as well as, other occupants of the complex who

conduct office hours on Saturdays.

13. The defendant Stasa, testified that they (defendants) were not subject to governmental law, but subject to God's law.

14. The original defendants admit that they, at the times alleged, have been on the internal portions of the private property and that they fully intend to go back onto the property in the future, on every occassion they can, with others who are willing to join them, for the purposes noted in Paragraph No. 11 above.

The issue presented for this Court's consideration is whehter the fefendants freedom of speech protected by the First Amendment of the United States Constitution is qualified, under the facts of the case at bar, by the private property rights of plaintiffs guaranteed by the Fifth Amendment.

Counsel for defendants rely upon Pruneyard v. Robins, 447 U.S. 74 (1980), for the proposition that this issue must be answered in the negative and the defendants have a protected right to be

present on plaintiffs' property is utilized as an office complex in the geographical location that is a commercial area and the functional equivalent of a "community business block". This Court believes that defendants have misapplied Pruneyard since the issue in Pruneyard was whether or not the California Court had wrongly interpreted the California Constitution as protecting "speech and petitioning, reasonably exercised in shopping centers even when the centers are privately owned."

The facts at bar do not establish a "shopping center" as discussed in Pruneyard or Lloyd v. Tanner, 407 U.S. 551 (1972). Plaintiffs' office complex has 70 parking spaces for six separately indentifiable office operations on a 2.34 acre site. The doctors, psychologists, consultants and oral surgeons in Fairfield Commons do not invite the

public in general. The extension of Pruneyard is not appropropriate in the instant case. In so concluding, the right of an owner to the peaceful and quiet enjoyment of his property is inviolate and our trespass laws protect him from intrusions such as those of the defendants herein.

There was nothing presented this Court which persuaded it that picketing on the public sidewalk would prevent defendants from protesting the clinic operation. Obviously defendants did not believe it was the best method since they moved from the public walk to the private property on March 19, 1983. However, when balancing the rights of the defendants with the rights of the plaintiffs, it is the Court's determination that defendants must remain off plaintiffs premises.

It is therfore ORDERED that a Preliminary Injunction be issued as

requested by plaintiffs, the terms of which shall be the same as contained in the Temporary Restraining Order issued herein on August 11, 1983.

Mr. Sheperak is instructed to prepare a Judgment Entry in accordance with this Memorandum Decision and forward to cousel and the Court for signature and filing.

/s/Michael A. Rumer

MICHAEL A. RUMER, JUDGE

cc: Thomas J. Sheperak

Thomas G. Papps

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

FAIRFIELD COMMONS CONDOMINIUM ASSOCIATION, et al.

CASE NUMBER: 83-1905

- vs -

JOHN M. STASA, et al.

ENTRY

This matter being predominantly a case in equity, the Court shall proceed, first, on all the issues in equity; and

Thereafter the Court shall proceed with the jury trial on Defendant Reed's counterclaim.

In the matter of Plaintiff's motion for a protective order, IT IS HEREBY GRANTED in part and DENIED in part as follows:

A. Re interrogatories submitted by the defendants, represented by Thomas G. Papp:

(1) the plaintiff shall answer interrogatories 1-3-10 a (plaintiff shall submit a financial statement as of June 30, 1984);

(2) the plaintiff shall not answer interrogatories 2-4-5-6-7-8-9-10b-11-12-13.

B. Re interrogatories submitted by defendants, represented by John C. Wasserman:

(1) the plaintiff shall answer interrogatories 1-4-5-7-15 (plaintiff shall submit a financial statement as of June 30, 1984);
(2) the plaintiff need not answer interrogatories 2-6-8-9-10-11-12-13-14-16-17.

C. Trial is hereby set for August 1, 1984 @ 9:00 a.m.

D. All discovery shall be completed by July 16, 1984.

IT IS SO ORDERED.

/s/JOHN L. MAXWELL
JUDGE
Sitting by Assignment

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

| | |
|---|---|
| Fairfield Commons Condominium Association, et al., | Case No. 83-1905 |
| Plaintiffs | Assigned to Judge Rumer |
| VS. | PRELIMINARY INJUNCTION |
| John M. Stasa, et al. | Thomas J. Sheperak (8154) |
| Defendants | 3171 Republic Blvd. North, Suite 207 Toledo, Ohio 43615 419/841-2876 Attorney For Plaintiffs |

This cause came on to be heard on Plaintiffs' Motion for Preliminary Injunction on November 7, 1983, against three additional Defendants herein, Antoinette Moriarity, Kathleen Moriarity, a minor, and Marjorie Reed. The Court, having been advised that the aforesaid Defendants, through their respective counsel, have consented to the entry of a Preliminary Injunction against them herein; therefore, it is

ORDERED, that the Defendants,

Antoinette Moriarity, Kathleen Moriarity, a minor, and Marjorie Reed and all persons in active concert and participation with any of them, be and they hereby are restrained and enjoined, pending the determination of this action or until further order of the Court, from in any manner, either directly of indirectly, interfering with Plaintiffs' property or business in the following respects:

a. Entering, assembling, soliciting or picketing upon the private sidewalks, parking lots and grounds of Fairfield Commons located at 5162, 5164 and 5166 Monroe Street in the City of Toledo, Lucas County, Ohio;

b. Hindering, obstructing, blocking or otherwise interfering with vehicular or pedestrian access to or from the aforesaid property;

c. Conducting picketing, assembly or solicitation on any parts of the aforesaid property other than on the public sidewalk

adjacent to Monroe Street near the property and in a manner which will not hinder, obstruct, block or otherwise interfere with vehicular and pedestrian access to and from the aforesaid property; and it is further

ORDERED, that this Preliminary Injunction being with the consent of the aforesaid Defendants, no bond or security shall be required.

Dated: November 7, 1983

_____
JUDGE

APPROVED:

_____
Attorney for Plaintiffs

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

| | |
|---|---|
| Fairfield Commons Condominium Association, et al., | Case No. 83-1905 |
| Plaintiffs | Assigned to Judge Rumer |
| vs. | PRELIMINARY INJUNCTION Filed 10/05/83 2:12 p.m. |
| John M. Stasa, et al. | Thomas J. Sheperak (8154) |
| Defendants | 3171 Republic Blvd. North, Suite 207 Toledo, Ohio 43615 419/841-2876 Attorney For Plaintiffs |

This Cause came on to be heard on Plaintiffs' Motion for a Preliminary Injunction against defendants John M. Stasa, Marygrove Catholics United for Life, John E. Gaski, Marjorie G. Ganzel, (the "original Defendants") on September 8, 1983. The Court having considered the verified Complaint, testimony on behalf of the Plaintiffs and the original Defendants and the post-hearing Briefs of the parties, and it appearing that the Defendants are

actually engaged in committing and will continue to commit the acts set forth below, to the irreparable injury, loss and damage of the Plaintiffs, it is

ORDERED, that the Defendants, John M. Stasa, Marygrove Catholics United for Life, John E. Gaski, Marjorie G. Ganzel, their agents, and attorneys and all persons acting in concert and participation with them, be and they hereby are restrained and enjoined, pending the determination of this action or until further Order of the Court, from in any manner, either directly or indirectly, interfering with Plaintiffs' property or business in the following respects:

a. Entering , assembling, soliciting or picketing upon the private sidewalks, parking lots and grounds of Fairfield Commons located at 5162, 5164 and 5166 Monroe Street in the City of Toledo, Lucas County, Ohio;

b. Hindering, obstructing, blocking

or otherwise interfering with vehicular or pedestrian access to or from the aforesaid property;

c. Conducting picketing, assembly or solicitation on any parts of the aforesaid property other than on the public sidewalk adjacent to Monroe Street near the property and in a manner which will not hinder, obstruct, block or otherwise interfere with vehicular and pedestrian access to and from the aforesaid property; and it is further

ORDERED, that the Plaintiffs' security in the sum of $100.00 deposited with the Clerk of Court herein on August 11, 1983, be extended hereto for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained

Dated: October 5, 1983

/s/Michael A. Rumer
JUDGE

Approved:

Attorney for Plaintiffs:

/s/Thomas J. Sheperak
Thomas J. Sheperak

Attorney for Dedendants:

Submitted by counsel but
not forwarded to court.
Thomas G. Papps

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

| | |
|---|---|
| Fairfield Commons Condominium Association, et al., Plaintiffs | Case No. 83-1905 |
| | Assigned to Judge Rumer |
| | ORDER OF EXTENSION OF TEMPORARY RESTRAINING ORDER |
| Filed 10/05/83 2:11 p.m. | |
| John M. Stasa, et al. Defendants | Thomas J. Sheperak (8154) 3171 Republic Blvd. North, Suite 207 Toledo, Ohio 43615 419/841-2876 Attorney For Plaintiffs |

Pursuant to Rule 65(A), Ohio Rules of Civil Procedure, and upon the request and consent of the Defendants, Antoinette Moriarity and Kathleen Moriarity, that the Temporary Restraining Order issued herein on September 8, 1983, against three additional Defendants, Antoinette Moriarity, Kathleen Moriarity, a minor, and Marjorie Reed be extended as it applies to these consenting Defendants, Antoinette Moriarity and Kathleen Moriarity, for an

additional period of time to November 7, 1983, for the reason that counsel for these consenting Defendants will have inadequate time to prepare for the hearing on Plaintiffs' Motion for Preliminary Injunction prior to that time; and, therefore, for the reasons stated in support of said Temporary Restraining Order issued herein, and for good cause shown, it is

OREDERED, that the Temporary Restraining Order issued herein on September 8, 1983, against the additional Defendants, Antoinette Moriarity and Kathleen Moriarity, a minor, in all respects be and is hereby extended for an additional period of time to November 7, 1983; and it is further

ORDERED, that Plaintiffs' application for preliminary injunction be assigned for hearing on the 7 day of November, 1983 at 3:00 o'clock p.m. in Courtroom No. 3; and it is further

ORDERED, that copies of this Order

of Extension be mailed to the counsel of record for all parties herein.

Dated: Oct. 5, 1983

/s/Michael A. Rumer
JUDGE

Supreme Court, U.S.
FILED
DEC 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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No. 86-866

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ANTOINETTE MORIARTY
and KATHLEEN MORIARTY,
Petitioners

-vs-

FAIRFIELD COMMONS CONDOMINIUM
ASSOCIATION & CARL ARMSTRONG, M.D.
Respondents

---

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
LUCAS COUNTY, STATE OF OHIO

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# RESPONDENT'S BRIEF IN OPPOSITION

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The Respondents, Fairfield Commons Condominium Association and Carl Armstrong, M.D., respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Sixth Appellate District, Lucas County, State of Ohio in this case.

**REASONS WHY THE WRIT SHOULD BE DENIED**

1. Neither the decision below nor the record raises the First Question Presented in the Petition.

a. The First Question Presented asks what standards should apply when the enforcement of one party's private property interests "deprives another of his sole opportunity" to exercise his First Amendment rights . . . ?

b. The Court of Appeals below did not decide that question in this proceeding. The facts of record show that petitioners were neither "deprived" from exercising

their First Amendment rights nor was their prohibited activity upon the private portions of the property known as Fairfield Commons their "sole opportunity" to exercise their First Amendment rights.

c. As it is stated in the Petitioners' First Question Presented, an issue of "deprivation" of the "sole opportunity" to exercise First Amendment rights was never raised in the proceedings below. Petitioners were not "deprived" from exercising their First Amendment rights. The trial court merely restricted their exercise of their First Amendment rights to the public sidewalk in front of the subject property when balancing their First Amendment rights against the rights of the property owners as affirmed by the Court of Appeals which applied the law as defined by this Court in Amalgamated Food Employees Union,

Local 590 vs Logan Plaza (1968), 391 U.S. 308 and Lloyd Corporation vs Tanner (1972) 407 U.S. 551. (Pet. A-27 to A-36)

d. In their Statement of the Case, Petitioners cite the issue of abortion as "one of the most devisive issues of our time, and violative of Petitioners religious convictions." (pet. p.7) While that statement is true, there are other issues and beliefs held by others, equally important to those others holding those other beliefs. The freedoms and limitations thereon granted by the First Amendment apply equally to all, irrespective of the specific belief they are promoting. Indeed there is no heirarchy in the importance in beliefs to be expressed. As the freedom of their expression is applied equally, so are the limitations thereon.

e. The Petitioners herein testified that they are "not subject to governmental

law, but subject to God's law." (Pet. A-58, A-78) Because of the Petitioners' specific beliefs, they urge this Court to abandon the rules set forth for all to follow in the exercise of First Amendment rights as an exception because they believe their convictions to be more important than the beliefs of others who are subject to limitations on their exercise of First Amendment rights.

f. The record in this case shows that the Petitioners went way beyond reasonableness in the expression of their First Amendment rights to the point of "imprisoning" unwilling listeners by surrounding a person seeking to enter the subject property. Basic in the exercise of the First Amendment rights is the limitation imposed thereon; "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of

speech...does not mean that one can talk or distribute where, when and how one chooses." Breard vs Alexandria, 341 U.S. 622, 95 L Ed 1233, 71 S Ct. 920.

g. The record in this case further shows that the Petitioners used false statements and misrepresentations to deceive persons entering the premises. Petitioner, Kathleen Moriarity, admitted in testimony that she wore a white lab coat while picketing to deceive persons entering onto the premises to believe that she was part of Respondent, Dr. Armstrong's, clinic staff so that they would stop to talk with her. "Picketing accompanied by false statements or misrepresentation is not protected by the constitutional guaranty of freedom of speech." Casey vs Cincinnati Typographical Union, 45 F 135, 12 LRA 193.

h. Although the Petitioners attempt to characterize themselves as peaceful folk merely attempting to get a message across

to others in the exercise of their First Amendment rights, the transcript of the trial (which the Petitioners have attempted to rely upon in their "Reasons for Granting the Writ, beginning at page 11 of the Petition) has not been appended to the Petition, and shows otherwise.

i. Petitioners argue (Pet. p.11) that the Respondents used State action through the use of "trespass laws" to deny Petitioners access to their "intended audience." The record, as provided by petitioners, is devoid of any substantiation of that allegation. If it were true, they would have provided the pertinent parts of the record in substantiation. Of course the Petitioners' argument fails to allege whether the "trespass laws" involved are criminal trespass or common law trespass in civil matters. This is an attempt to support

their theory that the imposition of restraints upon their claimed First Amendment rights was a "state action" as opposed to an action of an "owner of private property" so as to circumvent the decision of this Court regarding the rules governing this matter in Lloyd Corporation vs Tanner (1972), 407 U.S. 551. (see Pet. A-32).

j. The Civil suit brought by Respondents and the resulting Temporary Restraining Orders, Preliminary Injunctions (consented to by the named Petitioners) and, subsequent, Permanent Injunction issued by the trial court, affirmed by the Court of Appeals could never be characterized as a State action so as to be used by Petitioners as a basis to claim exemption from the Lloyd ruling.

2. Neither the decision below nor the record raises the Second Question Presented in the Petition.

a. The Second Question Presented suggests that the contempt proceedings held on Plaintiffs motion to show cause and the trial court's subsequent issuance of an order to show cause was a criminal or quasi-criminal action.

b. The Second Question Presented also raises a new matter in that Petitioners suggest that they were denied the names of Witnesses prior to trial in the contempt proceedings which suggestion is clearly contrary to the record.

c. The contempt proceedings in question were civil in nature because they involved the disobedience of an order of the court in a civil action for the benefit of the opposing party, Beach vs Beach, 99 O App 428, 59 O Ops 187, 71 OL Abs 115, 134 NE2d 162, and involved a prison sentence (one day) which was conditional, Brown vs Executive 200, Inc., 64 OS2d 250,

18 00 3d 446, 416 NE 2d 610. Also, Section 2705.05 of the Ohio Revised Code provides for a maximum fine of $500.00 and a maximum of 10 days imprisonment.

d. As such, even if the civil contempt proceedings are quasi-criminal, such amounted to a petty offense as defined by this Court in Bloom vs Illinois, 391 U.S. 194, 20 LEd 2d 522, 88 SCt 1477 and Duncan vs Louisiana, 391 U.S. 145, 20 LEd 2d 491, 88 SCt 1444.

e. Due Process required that the person charged with contempt have the right to confront the witnesses against him. The record is straight forward that Petitioners not only had the opportunity to hear the testimony of all witnesses against them in open court but exercised their right to cross examine said witnesses.

f. In their argument, the Petitioners complain that they were denied the names and addresses of all patients and employees

who were present on the property on the dates of the alleged violations of the court's orders. They claim that some of these persons may have been potential witnesses.

g. The Second Question Presented does not refer to "potential" witnesses. No person whose name was not provided to Petitioners was called to testify at the trial on this matter; therefore, the Petitioners were not "denied the names of witnesses prior to trial" and were not denied due process.

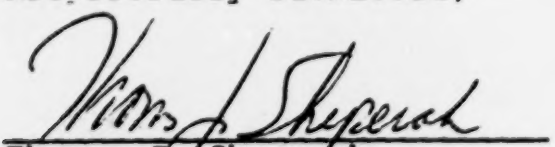
3. Not only does the Petition fail to present questions which were part of the record or were ruled upon below so as to be certifiable to this Court, the Petition does not show "special and important reasons" for this Court to grant the writ of certiorari as are set forth in Rule 17.1 (a), (b) and (c) of the Rules of this

Court. The record shows no conflict in interpretation of law, no impropriety in the proceedings and that substantial justice was done. The Supreme Court of Ohio was correct in finding that Petitioners, in the proceedings below, raised no substantial constitutional question (Pet. A-3).

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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